FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. .....

79-1729

ERNEST LOWERY MCBRIDE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

This is a criminal case. The judgment of the Court below was issued March 17, 1980, per order of that Court issued the same day. No petition for rehearing was filed. Upon Petitioner's application for enlargement of time, the Chief Justice has extended the time for the filing of this Petition to and including May 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

OPINION BELOW

The Court of Appeals originally issued its opinion below on October 4, 1979. (Appendix A). That opinion is unpub-

lished. However, because during the pendency of the appeal below Petitioner's attorney died, the Court of Appeals granted leave in its original opinion to file supplemental briefs. Supplemental briefs were filed, and after consideration thereof the Court below entered its judgment on February 7, 1980. (Appendix B). That opinion was also unpublished. Unfortunately, notice of the entry of that judgment was mistakenly addressed to Petitioner's deceased attorney, and his new counsel did not receive notice thereof until March 11, 1980. This fact was communicated to the Court of Appeals, which thereafter recalled its judgment and ordered that it be issued as of March 17, 1980. (Appendix C).

QUESTIONS PRESENTED FOR REVIEW

Did Not the Trial Court Err in Failing to Grant a Mistrial After Counsel for a Testifying Co-Defendant Commented Directly on the Failure of Petitioner to Testify.

Since Co-Conspirator Reid Was Acquitted, Should Not a New Trial Be Granted Because the Jury was Allowed to Consider Against Petitioner Extrajudicial Statements Made By Reid to Third Persons.

Was It Not Harmful Error for the Court to Have Allowed an F.B.I. Agent to Relate Before the Jury Statements Made By Co-Conspirator Reid Which Were Not In Furtherance of the Conspiracy and Which Improperly Bolstered Reid's Own Testimony.

Is Not the Cumulative Effect of the Errors Noted Herein Sufficiently Great to Require That Petitioner Be Granted A New Trial.

STATUTES INVOLVED

1. Rule 104 (a), Federal Rules of Evidence:

"(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

2. Rule 801 (d) (2) (E), Federal Rules of Evidence:

"(d) *Statements which are not hearsay.* A statement is not hearsay if—

(2) *Admission by Party-opponent.*

The statement is offered against a party and is *** (E) a statement by a conspirator of a party during the course and in furtherance of the conspiracy."

3. Rule 802, Federal Rules of Evidence:

"Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

STATEMENT OF THE CASE

Petitioner Ernest Lowery McBride, along with Philip Monroe Reid, David Rule Nichols and three others, was charged in a multiple count indictment with conspiracy (18 U.S.C. §371) and wire fraud (18 U.S.C. §1343). Two of the other defendants were dismissed from the case and one, Paul Venus, after entering a plea of guilty, testified for the government. Trial of Petitioner, Reid and Nichols was held in October, 1978, before a jury. Nichols and Reid were acquitted on all pertinent counts; Petitioner was convicted on a conspiracy count and on three wire fraud counts.

The substance of the government's allegations was that the defendants concocted a scheme whereby Reid would contact persons who needed loans, secure from them an advance fee and place these loan applications with a qualified lender, using Petitioner as a co-broker. Petitioner would actually process the loan applications. The government's theory was that Petitioner would tell the potential borrowers that a Texas corporation, run by Paul Venus, was to function as a lender or a loan guarantor. The potential borrowers would rely on this information and sometimes send additional fees to Petitioner and Reid.

No loans were actually made nor any of the advance fees refunded. The government's evidence revealed that the Texas corporation was not, in fact, in the financial condition to act as a lender or guarantor. The government sought to prove that the defendants knew the assertions that the Texas corporation could be a lender or guarantor were false, and that, therefore, the potential borrowers were defrauded by the defendants. Proof of the sending of telegrams for the purpose of executing the alleged scheme was also presented.

As noted, only Petitioner was convicted. Paul Venus, who entered a plea of guilty and testified in exchange for the government's recommendation that he receive a probated sentence (which was followed by the trial court) was the only other participant in the alleged scheme who was found to be culpable. Venus vaguely testified that he allowed his corporation to be characterized as a lender or guarantor even though both he and Petitioner knew it was not financially able to do so. It should be noted at this point, however, that the indictment nowhere alleged that the commitments or guarantees of the Texas corporation were false, that the defendants used them to satisfy or placate potential bor-

rowers knowing them to be false, or that the defendants deliberately or knowingly falsified such documents or knowingly misstated the financial condition of the Texas company.

Both the nature of the alleged scheme and artifice to defraud alleged in the indictment and the evidence that was introduced to support it are vague and uncertain, a fact of much importance in considering the questions presented for review herein.

Neither Petitioner nor Nichols chose to testify, but Philip Reid did take the stand. The essence of his testimony was that he was a financial broker and that Petitioner was referred to him through his (Reid's) contacts. Reid began to do business with Petitioner because his (Reid's) usual contacts often took too long a time to process loan applications. (Trial S/F 562). Various innocuous-appearing correspondence and documents were exchanged between the two men relating to the loan applications of the persons listed as "victims" in the indictment.

After no loans were obtained and no refunds made, the F.B.I. was called in. The sum of Reid's testimony was that, *as far as he knew*, there was nothing wrong with the operation and that he had no reason to believe that Petitioner was not a legitimate broker. He had attempted to "check out" Petitioner and Venus and had found nothing wrong. He had no reason to believe that the letters and documents sent by Petitioner were less than genuine.

Reid knew that Petitioner was a broker and that he was not going to lend money himself. (Trial S/F 687-688). In general, Reid knew of no promises by Petitioner that fees

would be returned if no loans were completed. (Trial S/F 691-693). The whole tenor of Reid's testimony was that he was also a "victim" of Petitioner.

As noted earlier, the government's efforts at trial were directed at proving that the defendants conspired to take money from the victims but never intended to seek loans. Inferentially, that theory drew support from Venus' testimony that Petitioner knew that his (Venus') company was not financially able to back the loan guarantees Petitioner was delivering to the "victims." But, as also noted, the distorted financial condition of Venus' company was not alleged in the indictment as a part of the scheme to defraud. It is urged, therefore, that the testimony of Venus, though incriminatory as to Petitioner in general terms, should not be relied upon by this Court as demonstrating the harmlessness of the errors of which complaint is made herein.

QUESTION NUMBER ONE

Did Not the Trial Court Err in Failing to Grant a Mistrial After Counsel for a Testifying Co-Defendant Commented Directly on the Failure of Petitioner to Testify.

At trial, Co-defendant, PHILIP REID, testified in his own behalf, denying knowledge of any scheme to defraud. Petitioner did not testify. During closing arguments, counsel for Reid was reviewing the evidence, including certain documents transmitted to Reid from Petitioner upon which the government relied to establish culpability. Reid's position was that he did not know Petitioner was doing anything wrong and could not be charged with such knowledge based upon the documents, which did not themselves reflect any

fraud. Reid's counsel pointed out all these matters and then said:

> "Of course, we don't know what any of these things are because there was never any testimony by Mr. McBride" (Trial S/F 795).

Objection was made and sustained, and the trial court told the jury to disregard the remark, but motion for mistrial was overruled. (Trial S/F 796). Of the three defendants on trial, only Petitioner was convicted.

This contention was raised and overruled in the Court of Appeals. Petitioner strenuously urges that the Court below should have reversed the conviction because of the fundamentally prejudicial nature of this constitutional error.

The Constitution forbids comment on the failure of an accused to testify. See *Griffin v. California*, 380 U.S. 609 (1965); *Stewart v. United States*, 366 U.S. 1 (1961). This prohibition extends not just to prosecutors and judges, but to counsel for co-defendants as well. See *United States v. De La Cruz Bellinger*, 422 F2d 723 (9th Cir. 1970), cert. denied 398 U.S. 942 (1970); *United States v. McKinney*, 379 F2d 259 (6th Cir. 1967); *DeLuna v. United States*, 308 F2d 140 (5th Cir. 1962).

There is no doubt, then, that the argument of counsel for Reid, making direct reference to Petitioner's failure to testify, was error. The trial court's instruction to disregard could not have cured the prejudice done to Petitioner, and the Court of Appeals erred in failing to reverse.

Several reasons appear why the error is not harmless. Certainly, the plain implication of the statement was that Reid was willing to say he did nothing wrong, but innocently relied on Petitioner, who, even up to the point of trial, was

not willing to give any explanation for his conduct, the obvious reason being that Petitioner had no innocent explanation to give. Counsel for Reid was trying to obtain acquittal for his client by putting all the blame on Petitioner and assigning to him, before the jury, a burden to bring evidence. This ploy clearly worked, for Reid was found not guilty while Petitioner was convicted on four counts.

Additionally, the trial court had erroneously allowed an FBI agent to relate all that Reid had told him about this matter during an interview at which Petitioner was not present. (Trial S/F 481-501). The agent's testimony impermissibly, but strongly bolstered Reid's testimony that he was duped by Petitioner. Although the Court did later instruct the jury to consider the agent's testimony only against Reid (Trial S/F 502), the damage had already been done. Reid's contention that his was an innocent involvement, and that he had been victimized by Petitioner, was implanted in the minds of the jurors and certainly must have bloomed when Reid's counsel made direct reference to the failure of Petitioner to testify and explain "any of these things."

A more harmful comment, within the context of this case, can hardly be imagined. Even the Government's attorney told the jury that Reid had been "duked" (sic) by Petitioner. (Trial S/F 773). The whole theme of the testimony and the arguments was that Petitioner had led astray both Reid and the victims, that Reid was willing to tell everything, but that Petitioner could not or would not come forward with an explanation. Petitioner's chances were devastated.

The harm was, in fact, greatly aggravated during the Court's instructions to the jury. Initially, the Court told

the jurors the defensive theories of all the defendants together. (Trial S/F 856-857). Thereafter, in the presence of the jury, Reid's counsel announced that he had an objection to the instructions given. (Trial S/F 867). The Court then told the jury that there were additional instructions requested. The Court then stated that Reid's contentions had been specifically outlined by his attorney in closing argument and immediately thereafter gave the following instruction (Trial S/F 868):

> "The defendant Reid says and contends that he was not a part of any conspiracy, if such a conspiracy did exist, that he was not a party to such a conspiracy, and that he recognizes that some of these people were entitled to their money back, and he has made arrangements to repay them, and that the contention of the Court (referring to the earlier instruction of the Court, at Trial S/F 856-857) saying that all of the defendants were contending that these funds were for services rendered is wrong, that he understands that the money was, is to be refunded, and he has made arrangements to refund it, and that Mr. McBride says and contends that it may very well be that some of these funds should be refunded but that it is a civil matter and is not a criminal matter."

Such an instruction could do nothing but highlight and emphasize the conflict between Reid and Petitioner and could not help but cause the jury to remember Reid's attorney's call for some explanation from Petitioner.

Because earlier the Court, in its instructions, had lumped together the contentions of all defendants, the later instruction spotlighted for the jury that Reid's defense was antagonistic to Petitioner, that Reid had been duped by Petitioner just as had the potential borrowers, and that Reid had told his story but Petitioner had not.

Under these circumstances, it cannot be said that the instruction of the trial court removed the harm done. The reference to Petitioner's silence was not "isolated and oblique." *United States v. Alpern*, 564 F2d 755 (7th Cir. 1977). Rather, this is a case where it is "unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to (Petitioner's) silence." *DeLuna v. United States, supra*, at 154. And it has long been said that "the naive assumption that prejudicial effects can be overcome by instructions to the jury *** all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949), concurring opinion of Justice Jackson.

Before a Federal Constitutional error may be determined harmless, this Court must be able "to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. State of California*, 386 U.S. 18 (1967). Under the circumstances of this cause, including the obviously antagonistic positions of Reid and Petitioner, the error was not a harmless one; the Court of Appeals erred in failing to reverse the conviction.

QUESTION NUMBER TWO

Since Co-Conspirator Reid Was Acquitted, Should Not a New Trial Be Granted Because the Jury was Allowed to Consider Against Petitioner Extrajudicial Statements Made By Reid to Third Persons.

Over numerous, continuous and strenuous objections, the trial court allowed witnesses to testify about statements made to them by co-defendant Reid. In admitting such evidence the Court told the jury that it was to be considered

only against Reid until and unless the jury finds beyond a reasonable doubt that, at the time the statements were made, a conspiracy existed and Petitioner and Reid were willful participants therein. The Court told the jury that upon such finding the statements could be considered against all persons who were willful participants. (Trial S/F 4-5). The Court reiterated these instructions in its charge. (Trial S/F 846).

The statements attributed to Reid were inculpatory in nature, moreso than Reid's own later testimony. It is urged that such statements did contribute to the finding of guilt returned against Petitioner. As to Petitioner, under the Court's instructions, the jury was to disregard the statements unless it found beyond a reasonable doubt that Reid was a willful participant at the time the statements were made. Since Reid was acquitted on all counts, the jury quite clearly should not have considered the statements against Petitioner.

The issues involved in this Question are multiple, beginning with the fact that the trial court did not follow the correct procedure in determining the admissibility of the extra-judicial statements of Reid. Under Rule 104 of the Federal Rules of Evidence, and the case law, the Court should have determined, before the jury heard the evidence, that it was more likely than not (i) that there was a conspiracy, (2) that the declarant and the defendant against whom the statements were offered were members of the conspiracy, and (3) that the statements were made in furtherance of the conspiracy. See *United States v. Petrozziello*, 548 F2d 20 (1st Cir. 1977); *United States v. Stanchich*, 550 F2d 1294 (2nd Cir. 1977); *United States v. King*, 552 F2d 833 (9th Cir. 1976), cert. denied 430 U.S. 966 (1977);

United States v. Bell, 573 F2d 1040 (8th Cir. 1978); *United States v. Santiago*, 582 F2d 1128 (7th Cir. 1978); *United States v. Andrews*, 585 F2d 961 (10th Cir. 1978); *United States v. James*, 590 F2d 575 (5th Cir. 1979), cert. denied ..... U.S. ....., 99 S. Ct. 2836 (1979); *United States v. Continental Group, Inc.*, 603 F2d 444 (3rd Cir. 1979).

Here, the Court left the matter entirely in the hands of the jury, never making the determination, based upon non-hearsay evidence, that the conspiratorial relationship between Petitioner and Reid had been established by independent proof sufficient to warrant admission of the statements. This was harmful error, as it "foreclosed (Petitioner) from the possibility of obtaining a preliminary determination in his favor without the danger of disclosing to the jury the contents of the declarations offered by the Government." *United States v. Ziegler*, 583 F2d 77 (2nd Cir. 1978).

The courts have recognized the danger inherent in allowing the jury to be exposed to evidence as potentially prejudicial as coconspirator declarations and the "doubtful utility" of instructions to disregard if the proper predicate is not later established. See *United States v. James, supra; United States v. Stanchich, supra; United States v. Bell, supra;* and see *Krulewitch v. United States, supra.* Here the Court erroneously left it to the jury to decide, but, when the proof failed to establish the predicate necessary (as the verdict of acquittal clearly shows), it was too late for the Court to withdraw that evidence. This case may illustrate best why the rule must be that the issue is for "the trained legal mind of the trial judge." *United States v. James, supra,* at P. 579.

It should be noted that a major portion of the trial consisted of statements made by Reid, which were introduced

through third parties, an FBI agent, (of which complaint is also made herein), and Reid himself. It is inconceivable that the jury could have segregated that evidence which it should properly consider against Petitioner from that which it should not. See *Kotteakos v. United States*, 328 U.S. 750 (1946); *Glasser v. United States*, 315 U.S. 60 (1942). Certainly the potential for harm is very great when the jury which must decide guilt also has the duty to determine what evidence it may consider. See *Jackson v. Denno*, 378 U.S. 368 (1964); *United States v. James, supra.*

This case presents a unique question, on unique facts. It is not a case where a coconspirator is subsequently acquitted on some counts after the trial court has properly determined the admissibility of declarations of that coconspirator. See *United States v. Jacobs*, 475 F2d 270 (2nd Cir. 1973), cert. denied 414 U.S. 821 (1973). It is not a case where a conspirator whose declarations had been introduced was acquitted at a *prior* trial, but where the proper standard for deciding admissibility had been observed. See *United States v. Cravero*, 545 F2d 406 (5th Cir. 1976), cert. denied 429 U.S. 1100 (1977). Neither is it a case where the coconspirator was acquitted for some clearly recognizable reason, such as entrapment. See *United States v. Gil*, 604 F2d 546 (7th Cir. 1979). Rather, this is a case where the jury acquitted the coconspirator on all counts for the sole reason that there was a reasonable doubt as to his involvement. By that verdict the jury was forever precluded from properly considering against Petitioner the statements of Reid, under its duty as charged by the trial court. Because the responsibility of determining whether Reid's statements could be used against Petitioner was left solely to the jury, this case is distinguishable from *United States v. Gil, supra*, where the trial judge

correctly observed the Rule 104 procedures in determining admissibility.

A point related to the instant contention was raised in *United States v. Ratcliffe*, 550 F2d 431 (9th Cir. 1977). The Court of Appeals there considered that the acquittal of a party whose statements were used against the convicted defendants retroactively rendered those statements inadmissible. The Court noted that the trial judge did instruct the jury not to consider the statements, but ventured the obvious opinion that "it is highly unlikely that the jury could be relied upon to follow such an instruction." It is at least as likely that the jury could not do so in this case.

It is no answer that the record here might support the admission of Reid's statements had the trial court in fact made the Rule 104 "more likely than not" determination, for no such determination was made. The trial judge gave no hint of awareness that the responsibility was his. It is just as conceivable that the trial court, which could observe the witnesses and better determine credibility, might have decided that Reid's statements were not properly before the jury. The trial court would then have been bound to determine whether a mistrial should be granted or whether a precautionary instruction would suffice to cure the harm. *United States v. James*, *supra*; *United States v. Bell*, *supra*; *United States v. Stanchich*, *supra*. Petitioner here was altogether denied that opportunity. See *United States v. Ziegler*, *supra*. It would be unfair for a reviewing court, which has but a cold record before it, to substitute, at this late date, its judgment for that most appropriately left to the judge presiding over and actually observing the trial. The instant complaint does not call for this Court to decide whether there was an abuse of discretion by the trial judge, for that

discretion was never exercised. It simply cannot be now determined whether the trial judge would have allowed the jury to consider against Petitioner the statements of Reid, whether he would have more firmly instructed the jury to disregard the statements, or whether he would have granted a mistrial. See *United States v. Petersen*, 611 F2d 1313 (10th Cir. 1979), dissenting opinion.

In sum, therefore, the jury here had no choice, under the instructions given, but to disregard, as to Petitioner, the evidence of Reid's out-of-court declarations. The acquittal of Reid requires this conclusion. Because the Court did not observe the proper procedure for determining the admissibility of those declarations, and because the jury may not realistically be relied upon to observe the general precautionary instructions given, there is a very real chance that Petitioner's conviction is based on evidence which should not have been considered. The Court of Appeals erred in failing to grant a new trial.

QUESTION NUMBER THREE

Was It Not Harmful Error for the Court to Have Allowed an F.B.I. Agent to Relate Before the Jury Statements Made By Co-Conspirator Reid Which Were Not In Furtherance of the Conspiracy and Which Improperly Bolstered Reid's Own Testimony.

Under Rule 801 of the Federal Rules of Evidence, statements made by a coconspirator of a party are not inadmissible as hearsay where such statements are made "during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), Fed. R. Evid. A coconspirator's statements "may be admitted against the accused *for no purpose what-*

ever, unless made during and in furtherance of the conspiracy." *Wong Sun v. United States*, 371 U.S. 471, 490 (1963).

As a general proposition, it is settled that statements of a coconspirator to law enforcement agents are not in furtherance of the conspiracy, but "rather a frustration of it." *Fiswick v. United States*, 329 U.S. 211, 217 (1946). Consequently, any such statements are hearsay, and inadmissible for any purpose. *Wong Sun v. United States, supra;* Rule 802, Fed. R. Evid.

In this case coconspirator Reid stated that he had become suspicious and set up meetings with agents of the Federal Bureau of Investigation. (Trial S/F 633-634). One of the agents was allowed to testify to numerous statements made to him by Reid during these meetings. (Trial S/F 481, et seq.). Hearsay objections were lodged and overruled until the end of the government's direct examination, at which time the Court instructed the jury that they should consider the agent's testimony as to Reid's declarations "only for or against the defendant Reid and not against the other defendants." (Trial S/F 502).

It seems perfectly clear that Reid's statements to the F.B.I. agents were not "in furtherance of" the conspiracy and were thus admissible "for no purpose." *Wong Sun v. United States, supra.* Yet the trial court told the jury that the agent's testimony did have a purpose — it could be considered *for* defendant Reid. (Trial S/F 502). Because Reid's testimony, and his defensive theory, was adverse to Petitioner, the trial court's instruction telling the jury that it may consider the agent's testimony for Reid was harmful to Petitioner. Rather than curing the error, the instruction given aggravated it. The Court of Appeals below erred in failing to reverse the conviction.

In *United States v. Zeigler*, 583 F2d 77 (2nd Cir. 1978), a similar complaint was found to be harmful error. There, as here, the harm was correctly identified as impermissible bolstering of the coconspirator's testimony. Considering that Reid's trial position was adverse to Petitioner here, the harm is no less apparent. To the same effect is *United States v. Blackshire*, 538 F2d 569 (4th Cir. 1976), cert. denied 429 U.S. 840 (1976). There the Court reversed a conviction where the trial judge allowed introduction of a coconspirator's statements to police. Even though the coconspirator later testified, thus mooting the confrontation clause issue, the Court of Appeals nonetheless found harmful error because of the significance of the evidence to the case against the defendant. The harm is just as great here, especially considering the errors previously mentioned in this Petition and the trial court's plainly adverse instruction as to the use to which the jury could put the hearsay testimony. This Court should reverse.

QUESTION NUMBER FOUR

Is Not the Cumulative Effect of the Errors Noted Herein Sufficiently Great to Require That Petitioner Be Granted A New Trial.

Petitioner here urges that the prejudicial effects of the three errors previously raised in this Petition, taken together, establish that he was denied the fundamentally fair trial guaranteed by the Fifth Amendment.

The three errors previously urged herein are interlocking. The admission of the extrajudicial declarations of coconspirator Reid could only have reflected badly on Petitioner, bolstering Reid and his hostile defense. The Court's various instructions to the jury were demonstrably off the mark,

and ineffective, in some cases even aggravating the harm. The crowning touch was Reid's attorney's direct comment on Petitioner's failure to testify. The cumulative effect of these errors surely resulted in a denial of due process of law.

It is submitted that under the circumstances this Court should consider this issue one of constitutional dimension and should, therefore, reverse unless it can declare that the error was harmless beyond a reasonable doubt. *Chapman v. California, supra.*

Petitioner recognizes that he is not constitutionally entitled to a perfect trial, only a fair one. *Lutwak v. United States*, 344 U.S. 604 (1953); rehearing denied 345 U.S. 919 (1953). He urges that, considering the aforementioned errors together, he did not in fact receive a fair trial in this case. The combined prejudicial effects of the three grounds of error heretofore raised cannot be deemed harmless. Reversal is respectfully requested.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully prays that this Petition for Writ of Certiorari be granted, that the decision of the Court of Appeals be reversed, and that a new trial be granted.

Respectfully submitted,

Robert T. Baskett

Bruce Baldwin

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing same in the United States mail, first class, postage prepaid. All parties required to be served have been served herewith.

Robert T. Baskett

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-5244

UNITED STATES OF AMERICA,

Appellee,

versus

ERNEST LOWERY MCBRIDE,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Woodrow W. Jones, District Judge.

Submitted: September 11, 1979 Decided: October 4, 1979

Before HAYNSWORTH, Chief Judge, WINTER and MURNAGHAN, Circuit Judges

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Charles F. Schwab, Jr. for Appellant; Phillip G. Kelley, Assistant United States Attorney (Harold M. Edwards, United States Attorney on brief) for Appellee.

PER CURIAM:

This appeal was taken after the defendant was convicted of several counts of conspiracy to commit fraud by wire in violation of 18 U.S.C. § 371, and of substantive offenses in violation of 18 U.S.C. § 1343.

After the appeal had been calendared for oral argument on September 11, 1979, the court was informed that the defendant's lawyer had died. An examination of the briefs,

however, discloses no contention of merit, and the panel is unanimously of the opinion that oral argument of the contentions made in the brief would neither be helpful to the court nor beneficial to the defendant. The panel wishes to provide defendant with a reasonable opportunity, however, if he wishes, to procure another lawyer who may file a supplemental brief. If such a supplemental brief is filed, it will be examined to determine whether it presents any question deserving of a plenary hearing.

The panel is concerned about the terms of probation granted after an initial period of confinement. Restitution was ordered, but the amount of money subject to restitution is not specified. The amount to be restored may or may not include certain expenses. Moreover, restitution is ordered at the rate of twenty-five percent of his gross income, which may preclude his operating a proprietary business or impose undue hardship upon his other creditors. Unless, therefore, a further hearing is granted, the judgment of conviction will be affirmed, but the case will be remanded for further clarification of the terms of probation.

The judgment of conviction is affirmed, but the case is remanded to the United States District Court for the Western District of North Carolina for clarification of the terms of probation.

The mandate will be stayed for a period of thirty days during which the defendant, through a substitute lawyer, may file a supplemental brief. For good cause shown, the Clerk may extend the thirty-day period of the stay. If a supplemental brief is filed within the period of the stay, it will be examined and the panel will determine whether or not a hearing should be held and this order further stayed pending such a hearing.

Affirmed and Remanded.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-5244

UNITED STATES OF AMERICA,

Appellee,

versus

ERNEST LOWERY MCBRIDE,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Woodrow W. Jones, District Judge.

Submitted: September 11, 1979 Decided: February 7, 1980

Before HAYNSWORTH, Chief Judge, WINTER and MURNAGHAN, Circuit Judges

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Bruce Baldwin, J. Albert Kroemer of Bruce Baldwin and Associates for Appellant; Phillip G. Kelley, Assistant United States Attorney (Harold M. Edwards, United States Attorney on brief) for Appellee.

PER CURIAM:

McBride was convicted of conspiracy to commit wire fraud and of three substantive counts of wire fraud. We affirmed those convictions in a previous opinion issued in this case. However, leave of court was granted to allow McBride to secure new counsel and submit an additional brief since his original counsel on appeal had been killed just prior to oral argument. The judgment of this Court was stayed pending

the submission of any such briefs. *United States v. McBride*, No. 78-5244 (Oct. 4, 1979). We have now received the supplemental brief as well as a response from the government. Of the three contentions raised in these materials only one has not already been finally decided adversely to McBride. That contention involves the sufficiency of the indictment.

Counts five and thirteen of the indictment are worded identically. They both charge McBride with sending a telegram on February 21, 1978 from Dallas, Texas to co-defendant Reid in Charlotte, North Carolina. Neither count specifies anything particular about the telegram sent. Thus, notwithstanding the fact that two clearly non-identical telegrams were introduced into evidence (Exhibits 10 and 26), both of which fit the above general description, McBride argues that he has been prejudiced by the duplicitous counts. His chief concern is with failure of the indictment to sufficiently apprise him of the charges against him and possible double jeopardy ramifications.

The government responds by noting that the United States Attorney's office involved has adopted an open file policy which permits an indicted party to inspect the evidence the government plans to use to convict that party of any particular count. McBride's trial attorney apparently did seek and was granted permission to inspect the files relative to counts five and thirteen. Thus the generalized wording of the indictment could not have prejudiced McBride in the preparation of his case. *Cf. United States v. Schembari*, 484 F2d 931, 934-35 (4th Cir. 1973). Moreover, McBride cannot complain that an adequate record does not exist should it be necessary for him to plead the bar of double jeopardy. Having reviewed the files as to counts five and thirteen, McBride was apprised of the specific charges and could have assured an adequate record by demanding a more particular statement or by requesting specific jury instructions connecting a particular exhibit with a particular count in the indictment. No such instruction was given or requested. No objection to the instructions given was tendered. McBride has waived any objection he may have on

this point. In any event, McBride clearly may not be re-indicted for wire fraud as to either telegram. Finally, there is no merit to the suggestion that the jury may have convicted McBride twice for the mailing of one telegram. Again, McBride could have requested an appropriate jury instruction to preclude such a possibility. But more importantly there is absolutely no evidence of record which would permit a finding that one telegram was sent by McBride while the other was not.

The judgment is affirmed except for clarification of sentence as provided in *United States v. McBride*, No. 78-5244 (Oct. 4, 1979).

Affirmed.

FILED
March 17, 1980
U.S. Court of Appeals
Fifth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5244

UNITED STATES OF AMERICA,

Appellee,

versus

ERNEST LOWERY MCBRIDE,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Woodrow W. Jones, District Judge.

Upon consideration of the appellant's motion and for reasons appearing to the court,

IT IS ORDERED that the mandate in this case is hereby recalled and stayed pending the filing of a timely application for a writ of certiorari with the United States Supreme Court.

IT IS FURTHER ORDERED that the judgment in this case is recalled and issued as of this 17th day of March 1980.

For the Court — by Direction.

/s/ WILLIAM K. SLATE, II
Clerk

Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1729

In the Supreme Court of the United States

OCTOBER TERM, 1979

ERNEST LOWERY MCBRIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a mistrial when his failure to testify was commented on by counsel for his co-defendant during closing argument.

2. Whether petitioner was prejudiced by the admission of extrajudicial statements by an acquitted co-defendant, where the jury was instructed that the statement could not be considered against petitioner unless the jury found beyond a reasonable doubt that the defendant was part of the conspiracy.

3. Whether extrajudicial exculpatory statements by a co-defendant, not in furtherance of the conspiracy, were properly admitted.

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OPINION BELOW

The memorandum opinions of the court of appeals (Pet. Apps. A, B) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 17, 1980. The Chief Justice extended the time for filing a petition for a writ of certiorari to May 1, 1980, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiracy and three counts of wire fraud, in violation of 18 U.S.C. 371 and 1343. He was sentenced to concurrent terms of three years' imprisonment on the substantive counts and given a consecutive sentence of three years' imprisonment on the conspiracy count. The latter sentence was suspended in favor of probation. The court of appeals affirmed by per curiam order (Pet. App. B).

Petitioner was charged, together with Paul Venus, Philip Reid and David Nichols, with using wire communications to further an "advance fee swindle"—*i.e.*, a scheme whereby persons needing loans would be induced to pay finder's fees in advance but would receive neither the loans that they sought nor a refund of the fees they had paid. Reid was a loan broker who contacted potential borrowers and offered them the loan

finding service (App. 6–7, 22, 78–96, 120–121, 130, 152, 176, 213–214, 232–233, 255–256, 271–273).[1] A company owned by Venus—who pleaded guilty and testified for the government—was portrayed as either a source for the loans or a guarantor that would enable the potential borrowers to obtain loans from other sources. Petitioner was the middle man who purportedly would obtain either the loans or the necessary guarantees from Venus's company. In fact, Venus's company was not in a financial position either to make or to guarantee loans (App. 421–422, 425–426, 430–432, 443, 454–456). At petitioner's direction, Venus altered the figures on his company's financial balance sheet so that when petitioner showed it to potential borrowers the company would appear to be financially able to perform the function claimed for it (App. 331–333, 427–432, 435–436). Interstate wire facilities were used to send inducements and assurances to potential borrowers and by the latter to transmit the advance fees (App. 7, 9–10, 77, 79, 215–216, 256, 279, 302–322).

Petitioner put on no witnesses in his defense and did not take the stand. Reid testified extensively about his dealings with petitioner and certain victims of the scheme (App. 540–637, 729–736) and was extensively cross-examined by petitioner (App. 679–729). Petitioner's defense, in closing argument to the jury, was that he had not defrauded anyone because he was at all times attempting in good faith to secure loans or loan guarantees for the applicants, which was, he as-

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[1] "App." refers to the two-volume appendix in the court of appeals.

serted, all he had undertaken to do (App. 774–790). Reid's defense was that he had acted in good faith and relied on petitioner's representations (App. 790–807). Reid and the other co-defendant, Nichols, were acquitted; petitioner was convicted.

ARGUMENT

1. In his closing argument, co-defendant Reid's attorney urged that Reid could not be charged with guilty knowledge on the basis of certain documents, including a letter transmitted to him by petitioner and referring to "our trust department" and "[o]ur underwriting department." He then added: "Well what in the world is the underwriting department? Of course, we don't know what any of these things are because there was never any testimony by [petitioner]" (App. 795). Petitioner requested the court to instruct the jury to disregard the statement, and the court immediately instructed (App. 796):

> Ladies and gentlemen of the jury, in a criminal case, a defendant charged in the bill of indictment is not required to testify. The Constitution of the United States provides that he is not, he or she is not required to testify, and if they do not testify, that cannot be used against them in any way. That's improper argument, and you will not consider it. Blot it out of your mind. Proceed.

Only after petitioner's requested instruction was given did petitioner move for a mistrial. His motion was denied (*ibid.*).

The motion for mistrial was properly denied. We agree that it is not proper for one defendant to com-

ment on the failure of another to testify. The statement here, however, was isolated and casual, referring to the collateral matter of the "underwriting department." No prejudice can be thought to have resulted, in view of the court's immediate and firm instruction to the jurors not to consider counsel's comment but to "[b]lot it out of your mind." Compare *United States* v. *Kaplan*, 576 F.2d 598, 600 (5th Cir. 1978), cert. denied, 439 U.S. 1078 (1979).

Petitioner inappositely invokes *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962), for the proposition that a curative instruction was an insufficient remedy and a mistrial was required (Pet. 10). However, the result in *DeLuna*—the only case cited by petitioner in which the conviction was reversed because of comments by a co-defendant on the defendant's failure to testify—was the product of the peculiar facts of that case, as the Fifth Circuit itself and other circuits have subsequently pointed out in distinguishing its holding.

First, as the *DeLuna* court itself noted, the comments by co-defendant's counsel "were not casual or isolated references; they were integral to Gomez's defense" (308 F.2d at 143). See also *United States* v. *Washington*, 550 F.2d 320, 328 (5th Cir.), cert. denied, 434 U.S. 841 (1977) (referring to the fact that counsel in *DeLuna* "repeatedly commented" on the failure to testify); *United States* v. *Moreno-Nunez*, 595 F.2d 1186–1187 (9th Cir. 1979). Moreover, the co-defendants in *DeLuna* "argued mutually inconsistent defenses to the jury, in that each attempted to convince the jury that the other was to blame for the crime charged," *United States* v. *Alpern*, 564 F.2d

755, 761 (7th Cir. 1977); see also *United States* v. *Nakaladski*, 481 F.2d 289, 302 (5th Cir.), cert. denied, 414 U.S. 1064 (1973); *United States* v. *Shuford*, 454 F.2d 772, 779 (4th Cir. 1971); *United States* v. *Hines*, 455 F.2d 1317, 1334 (D.C. Cir. 1971), cert. denied, 406 U.S. 975 (1972). Thus, "if one defense were believed, the other could not be." This created a dilemma for the jury, which might have been resolved on the basis of repeated reminders that one defendant had testified and the other had not. *United States* v. *Kahn*, 381 F.2d 824, 841 (7th Cir.), cert. denied, 389 U.S. 1015 (1967). The intended effect of the comments was to invite the jury to infer DeLuna's guilt—and hence Gomez's innocence—from DeLuna's failure to testify, see *United States* v. *Kaplan*, *supra*, 576 F.2d at 600, and this effect was magnified by the extended colloquy between the court and lawyers regarding the comments (see 308 F.2d at 154–155). In short, as noted in *United States* v. *Hines*, *supra*, the "'real prejudice in the *DeLuna* case was not in the comment on failure to take the stand but in the situation to which the comment was directed'"—*i.e.*, the strongly antagonistic defenses. 455 F.2d at 1334 n.15, quoting 8 *Moore's Federal Practice* ¶ 14.04[3], at 14–22 (1965 ed.).

The present case is quite different. The statement was made in passing, and Reid's and petitioner's defenses were not mutually exclusive. Petitioner's defense was not that Reid, rather than petitioner, had perpetrated the fraud; it was that petitioner, as a broker, had undertaken only to attempt to secure loans or guarantees, and had carried out that obligation in good faith. Reid's defense was that he had acted

in good faith, without intent to defraud the potential borrowers; this defense did not assume the existence of a conspiracy to defraud, but merely took the position that if there was such a conspiracy, Reid was not part of it (see Pet. 9). It is true that Reid claimed to have relied on petitioner's representations as much as did the potential borrowers. But, unlike in *DeLuna*, it was not necessary for Reid's acquittal that the jury convict petitioner. Under these circumstances, there is no reason to believe that the court's prompt and forceful instruction did not cure any prejudice to petitioner from counsel's statement.

2. Petitioner argues (Pet. 10–15) that the district court erred in allowing certain witnesses to testify about statements made to them by co-defendant Reid. Petitioner does not identify the witnesses or their objectionable testimony, but he presumably refers to testimony by victims of the advance fee scheme. As petitioner concedes, however (Pet. 10–11), the court, in admitting the evidence, instructed the jury that the evidence was to be considered only against Reid until and unless the jury found beyond a reasonable doubt that, at the time the statements were made, a conspiracy existed and that petitioner and Reid were willful participants in it (App. 4–5, 846). Petitioner argues, however, that in accordance with case law interpreting Fed. R. Evid. 104, the court should have made a preliminary determination that it was more likely than not that there was a conspiracy, that petitioner and Reid were members, and that the statements were made in furtherance of the conspiracy. See, *e.g.*, *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. de-

nied, 442 U.S. 917 (1979); *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979).

It is true that the court did not make a finding on the record along the lines suggested by petitioner and by the cases upon which he relies, and we agree that the court should ordinarily do so.[2] It is possible that such a finding might be inferred from the court's decision to allow the evidence to be considered by the jury. *United States* v. *Continental Group, Inc.*, *supra*, 603 F.2d at 457–458, and cases cited. But, in any event, the court's failure to make an express finding on admissibility in this case was clearly harmless error.

As noted, the court instructed the jury that it could consider the evidence as against petitioner only if the jury found *beyond a reasonable doubt* that, at the time the statements were made, a conspiracy existed and petitioner and Reid were participants in it. As the cases relied upon by petitioner (Pet. 11–12) amply demonstrate, since the advent of Rule 104, a defendant is not entitled to an instruction placing such a strict limitation on the jury's consideration of a co-conspirator's declarations. Petitioner was therefore advantaged by the court's instruction, and there is no reason to believe that the jury disregarded it. There was ample other evidence in the record—including documentary evidence and the testimony of Venus, Reid and others who had personal encounters with petitioner—to support his conviction without regard to the testimony as to Reid's statements.

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[2] Petitioner did not request the court to make such a finding.

There was also ample evidence, surely a preponderance (see, *e.g.*, *United States* v. *James*, *supra*, 590 F.2d at 582), that a conspiracy existed, that petitioner and Reid were participants, and that Reid's statements were made in furtherance of the conspiracy, thereby making entirely proper the jury's consideration of Reid's statements against petitioner. The acquittal of Reid, whether because of the jury's reasonable doubt about his guilt or for some other reason, does not undercut the satisfaction of the threshold preponderance-of-the-evidence standard for admissibility of the evidence. Moreover, the evidence overwhelmingly establishes a joint enterprise on the part of Reid and petitioner. It is proof of such an enterprise, rather than a conspiracy as such, including an unlawful agreement, which is necessary to satisfy the co-conspirator declaration exception in Fed. R. Evid. 801(d)(2)(E). *United States* v. *Gil*, 604 F.2d 546 (7th Cir. 1979); *United States* v. *Trowery*, 542 F.2d 623, 626 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977).

What is more, Reid in fact testified at length about his dealings with the loan applicants and petitioner, and he was subjected to extensive cross-examination by petitioner. This is not a case, then, in which a defendant might have been prejudiced because of the absence of an opportunity to confront the declarant and cross examine him regarding the truth of the out-of-court statements. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971). Accordingly, even if the statements were technically hearsay, Reid's extensive testimony on the same subject matter negates any possibility that their admission was prejudicial error justifying reversal.

Finally, the exception for declarations of a co-conspirator to one side, Reid's statements regarding petitioner appear to have been admissible under Fed. R. Evid. 801(d)(2)(D) in any event.[3] It appears that Reid took directions from petitioner with respect to the loan applications involved here (App. 644) and that he was therefore acting as petitioner's agent in dealing with the applicants. This claim therefore does not warrant review by this Court.

3. Petitioner also objects (Pet. 15–17) to testimony by FBI Agent Turner recounting Reid's statements to him about the advance fee scheme (App. 480–500). This objection is baseless. In the first place, petitioner did not initially object until half way through Turner's testimony, and then only on the ground that the testimony was repetitious, not because it was hearsay as to him (App. 492).[4] Furthermore, at petitioner's request, the court later gave the following instruction (App. 502):

> Ladies and gentlemen of the jury, upon the motion of the defendants Nichols and McBride, the Court instructs you that the alleged statements made by the defendant Reid to the FBI Agent Turner, who testified Friday, will not be considered by you in any respect. All the testimony of the witness

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[3] Rule 801(d) provides:

> A statement is not hearsay if—
>
> * * * * *
>
> (2) Admission by a party-opponent. The statement is offered against a party and is * * * (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, * * *.

[4] The testimony was plainly admissible as to Reid. Fed. R. Evid. 801(d)(2)(A).

> Turner will be considered by you only against the defendant Reid and not against the other defendants in any respect. The witness testified to certain alleged statements which were made by Mr. Reid, the defendant Reid. They will be considered by you only for or against the defendant Reid and not against the other defendants.

Petitioner seizes upon the isolated statement in the instruction that the agent's testimony could be considered "for or against" Reid as indicating that the jury could consider the testimony for the benefit of Reid and, thereby, to the detriment of petitioner (Pet. 16). But elsewhere in the instruction the court makes it clear that the evidence was not to be considered by the jury "in any respect" as to petitioner, and was to be considered only "against" Reid and not "against" petitioner. It seems unlikely the jury would have attached much significance to the single reference to consideration of the evidence "for" Reid. Petitioner did not object to the court's cautionary instruction, on this or any other ground, when it was given, and he should not be permitted to raise such an objection here. Fed. R. Crim. P. 30. Because the testimony was not to be considered against petitioner, his reliance on Fed. R. Evid. 801(d)(2)(E) and *Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963), regarding admissibility of a co-conspirator's declarations as against the defendant, are without merit.

In any event, as explained above, petitioner's defense was not inconsistent with Reid's. Both petitioner and Reid sought to convince the jury that they acted in good faith within the customary boundaries of the role of a loan broker. Consideration of Agent Turner's tes-

timony in Reid's favor therefore would not necessarily have redounded to petitioner's detriment. To be sure, the agent's testimony recounted statements by Reid that he had relied on representations by petitioner, but this is nothing more than what Reid himself testified to at length during the trial. Thus, the agent's testimony regarding Reid's statements mentioning petitioner, as well as Reid's statements referring to victims of the advance fee scheme, were at most duplicative of the trial testimony of Reid and the victims. Given this, and the court's instruction that this testimony was not to be considered in connection with petitioner in any event, petitioner's assertion of error is wholly without merit.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

JULY 1980

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[5] *United States* v. *Blackshire*, 538 F.2d 569 (4th Cir.), cert. denied, 429 U.S. 840 (1976), and *United States* v. *Ziegler*, 583 F.2d 77 (2d Cir. 1978), upon which petitioner also relies (Pet. 17), are inapposite. In *Blackshire*, admission of the statement to the police by one defendant was held to be error because it was admitted against his co-defendant as well. See 538 F.2d at 571. In *Ziegler*, the extrajudicial statement at issue was not made by a co-defendant at all, but rather was a statement by an informer, and it too was admitted against a defendant. See 583 F.2d at 81.

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